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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. _____

GEORGE M. HART, dba SAN DIEGO CABINETS; ALLAN M. HOMES and CHARLES A. HOMES dba HOMES PRE-HUNG DOORS, and HOMES and SONS; THOMPSON CABINETS, INC.; CROSS CABINET & DOOR COMPANY; RONALD H. SANDOVAL dba RONDELL CABINET MFG.; HARRY B. PARKINSON dba PARKINSON CABINET SHOP and KITCHEN CABINETS, INC.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 14, 1972.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit appears at 453 F.2d 215.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 24, 1971. A timely petition for rehearing was denied January 7, 1972, and this Petition for a Writ of Certiorari was filed within 90 days after the filing and entering of judgment on February 14, 1972. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether there should be required that before a union is bound to a multi-union, multi-employee collective bargaining arrangement there must be a "practice" of such collective bargaining even though there is already consent to such arrangement.

STATUTORY PROVISIONS INVOLVED

National Labor Relations Act, as amended, §8(a) (1, 5), 29 U.S.C. §158(a)(1, 5).

STATEMENT OF THE CASE

Petitioners are the individual employers of workmen (mainly carpenters), who have refused, as employers, to bargain with Carpenters Local Union No. 2020, United Brotherhood of Carpenters & Joiners of America, AFL-CIO (herein "Local 2020") as separate units at each petitioner's premises. (Cf. 183 NLRB No. 100).

The Southern California Association of Cabinet Manufacturers (herein "SCACM") is a trade association whose membership consists of small employers who manufacture kitchen and bathroom cabinets in the twelve Southern California counties, including San Diego County. SCACM bargains collectively for its members. Beginning in 1965, SCACM became party signatory to an agreement with the twelve Southern California Counties Mill Conference (herein "Southern California Conference"), the latter acting for and on behalf of certain local unions and district councils, including Carpenters Local Union No. 2020, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (herein "Local 2020"). Contractual relationships between SCACM and the Southern California

Conference embraced the time of the instant dispute since SCACM and the Conference had agreed to and signed a "1968-1971 Master Labor Agreement, 12 Southern California Counties Residential Cabinet, School and Full Mill and Laminate Fabricating and Manufacturing Industries between Southern California Association of Cabinet Manufacturers and United Brotherhood of Carpenters and Joiners of America, AFL-CIO."

Local 2020 is a signatory to this agreement and has never effectively withdrawn from it.

The purposes of this multi-employer, multi-union agreement are set out at page 1 of the above agreement:

> "The parties to this contract agree to cooperate in every reasonable way to insure performance of the obligations under this Agreement, to insure maximum flexibility of operations, movement of men, and expeditious completion of work."

The broad coverage of the agreement is set out, also at page 1:

"The employer recognizes the unions signatory hereto collectively as the sole and exclusive bargaining agency for all employees performing work in the 12 Southern California Counties . . . in the classifications listed in Exhibit 'A'."
(Emphasis added)

Contemplating that new employer members might have existing labor agreements, an accommodation to this eventuality is provided in §12(a), page 3:

"All employers who are or who become members of the Southern California Association of Cabinet Manufacturers are parties to this Agreement and are entitled to the benefits and subject to the obligations hereof; except that, where a Labor Agreement was previously in existence covering such employer any grievance or dispute existing as of the date of affiliation with the Southern California Association of Cabinet Manufacturers or prior thereto

shall be processed, under the terms of the employer's prior agreement." (Emphasis added.)

Section 19(d) at page 6 provides in the same vein:

> "It is hereby agreed that no employee shall receive a reduction in wages due to the signing of this Agreement."

Now, back in 1966 this same Local 2020 and the San Diego Lumbermen's Association negotiated a labor contract, expiring July 31, 1969. The nine petitioners herein were not members of that Association, but seven of the nine, with another 40 "independent employers' in the San Diego area, negotiated separate and individual contracts containing essentially the same terms with the Local 2020 for the same period of time. Two petitioning employers (Randell and C.A. Homes) did not sign contracts. However, they complied with the terms and conditions of the 1966-69 Association contract.

On May 29, 1969 the Union served the San Diego Lumbermen's Association and each of the independent employers, including all

petitioners, with a 60-day notice of "our desire to change, modify or terminate" the contract. The Union declared that it stood ready, during June, 1969 to negotiate with employers, and added:

> "If we have no response to this notice, we will assume it is your intention to abide by the outcome of negotiations between our Union and the Lumbermen's Association.
>
> Thank you for an early response."

The San Diego Lumbermen's Association and Local 2020 agreed on a settlement approved by Union vote on July 30,1969. Later on that day, the Union notified all independents that it proposed to continue bargaining on "an individual employer basis", and suggested an August 2nd meeting.

Meanwhile, between July 26 and July 30, 1969, D & G (an individual employer not joined as a respondent before the National Labor Relations Board), and the seven petitioners, applied for membership in the Southern California Association of Cabinet Manufacturers (SCACM).

Notice of their membership in SCACM was sent by it to the Southern California Conference and a copy to Local 2020.

One petitioner (Cross), then wired Local 2020 that it was a member of "S.C. Association", and that the "S.C. Association" was the sole bargaining agent for its members, hence Cross could not meet with Local 2020 to negotiate on August 2, 1969.

On August 2, 1969, some independents met with Local 2020, but no petitioners. Those present signed an Interim Agreement with Local 2020. Before the meeting concluded C.A. Homes and Kent Cross appeared and Homes signed an Interim Agreement with Local 2020 for himself, and offered, as agent for the San Diego Lumbermen's Association, to sign "under protest" an Interim Agreement as an agent for the Association, and on behalf of all other petitioners. Local 2020 refused to accept any contract or permit any execution unless such act bound every petitioner as a separate, independent employer. This was not agreeable to Homes, who refused so to sign.

On August 4, 1969, Local 2020 struck

all independents who had not signed a separate Interim Agreement. Each petitioner then signed an Interim Agreement under protest.

The National Labor Relations Board, on the above facts, found that the petitioners had not been relieved of their obligations under §8(a)(5) and (1) of the National Labor Relations Act to bargain with Local 2020 by their affiliation with the Southern California Association of Cabinet Manufacturers, and ordered them to meet and bargain upon request of the Union.

The Court of Appeals granted the petition to enforce the order of the Board because, as it said in the final part of its opinion:

> "The Board suggests the above cases are controlling here. We agree. We are advised of no facts which make the Board's finding that Local 2020 had neither practiced nor consented to multi-employer bargaining alone, clearly erroneous." (Emphasis by the Court of Appeal.) 453 F.2d 215, 218.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE BINDING EFFECT OF THE ARRANGEMENT UPON A UNION WHICH HAS BEEN PARTY TO A MULTI-UNION, MULTI-EMPLOYER COLLECTIVE BARGAINING AGREEMENT

The Ninth Circuit stated the law accurately, as the passages quoted from its opinion demonstrate:

> "'[T]he test to be applied in determining the status of a multi-employer unit is "whether the members of the group have indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action, and whether the union representing their employees has been notified of the formation of the group and the delegation of bargaining authority to it, and has assented and entered upon negotiations with the group's representative." See Van Eerden Company, 154 NLRB 496,

499 (1965); The Kroger Company, 148 NLRB 569, 573 (1964).' " Western States Regional Council No. 3, Woodworkers v. N.L.R.B., 398 F.2d 770, 773 (C.A. D.C., 1968); Cf. N.L.R.B. v. Truck Drivers Local Union No. 449, etc. (Buffalo Linen) 353 U.S. 87 (1957).

" '[T]he validity of a multi-employer unit depends not only upon the intent of the employers, but the acceptance of the group unit by the union.' N.L.R.B. v. Bagel Bakers Council of Greater New York, 434 F.2d 884, 886-887 (C.A. 2, 1970), and cases cited. For, as the Court noted in Publisher's Association of New York City v. N.L.R.B., 364 F.2d 293, 294-5 (C.A. 2, 1966), cert. denied, 385 U.S. 971, 'a multi-employer unit is a purely consensual device;' therefore, '[m]utual consent * * * is a basic ingredient' although, 'the Board has not found inappropriate a unit where there was a consent as

evidenced by a history of a multi-employer bargaining.' (idem., pp. 294-5)

"The Court restated the controlling principles for withdrawal from multi-employer bargaining in Publisher's Association of New York City v. N.L.R.B., supra,364 F.2d at 295, as follows:

> 'The Board has held that an employer may freely withdraw, subject only to the requirement that, unless there is mutual consent, notice of withdrawal must be timely and unequivocal. [Retail Associates, Inc., 120 N.L.R.B. 388 (1958); Anderson Lithograph Co., 124 N.L.R.B. 920, 928-929 (1959), enforced sub nom.] N.L.R.B. v. Jeffries Banknote Co., 281 F.2d 893 (C.A. 9, 1960).'

"We quote with approval the [National Labor Relations Board's] brief:

> 'In United Fryer & Stillman, Inc., 139 NLRB 704, 708 (1962),

the union was a party to a multi-employer agreement with an association as well as party to a separate, individual agreement with the employer, United Fryer. United, during the term of these agreements, joined the association. Later when the union served timely notice of its desire to negotiate a new agreement, the association responded with a communication indicating that United had joined the association and that the association would bargain on behalf of United as part of the multi-employer unit. The union, however, declined to recognize United as part of the association and renewed its request for separate, independent bargaining on the pre-existing single-employer basis. The association insisted on a multi-employer bargaining. The Board sustained the Trial Examiner's finding that United had refused to bargain in good

faith in violation of Section 8(a)(5) of the Act, inasmuch as a single-employer unit is presumptively appropriate; previous bargaining was on a single-employer basis; the association's notice to the union of its desire to negotiate on a multi-employer basis was untimely because it was served after the union had served a timely request on the employer to bargain on a single-employer basis for renewal of their separate, independent agreement; and the union had refused to consent to the change in the bargaining relationship. And see, Moveable Partitions, Inc., 175 NLRB No. 149 (slip op. pp. 4-6), 71 LRRM 1095 (1969).' " 453 F.2d 215, 217-18.

However, these very quotations reveal the fact that the Court of Appeals for the Ninth Circuit in this instant case has introduced a new rule: that a union is not bound to continue participating in group

(multi-union, multi-employer) bargaining if there has been no "practice" of group bargaining. 453 F.2d 215, 218. (Quite clearly there has been consent, since Local 2020 was a signatory to the Conference Agreements since 1965. Furthermore, no evidence was introduced before the National Labor Relations Board to show that Local 2020 had or has ever withdrawn from the Conference or from the bargaining arrangements with SCACM, nor is any reference made to this absence of a showing to be found in the statement of facts by the Ninth Circuit.)

This newly announced rule by the Ninth Circuit conflicts with all the opinions of the Courts of Appeal cited in its own opinion (including some of its previous own opinions), and introduces a test which under some circumstances could never be met -- as, for example, at the beginning of a collective bargaining relationship where there can have been no history or "practice" of group bargaining. It is interesting to note in this connection that in the case which the Ninth Circuit quoted above, Western States Regional Council No. 3 v. N.L.R.B., 398 F.2d 770 (C.A. D.C.

1968), the Court there sustained a Board finding that the employers bargaining group was appropriate even though "the history in the lumber industry has been bargaining by single employers or informal, not fully bound groups. Although obviously past actions may be indicative of present intent, in view of other credible evidence in the record, and given the fact that the Board and the trial examiner are of one mind, we cannot say that the conclusion that the employers intended to be bound in 1963 is unfounded." 398 F.2d 774.

Conversely, if a union unequivocally and in a timely fashion withdraws its consent to engage in group bargaining, the National Labor Relations Board will support individual bargaining in the face of "a long history of multi-employer bargaining", Publishers' Association of New York City v. National Labor Relations Board, 364 F.2d 293, 294 (C.A. 2, 1966), and will support this in the face of a great deal of "practice."

Because actually it is "consent" which is the essence of the group bargaining arrangement and because "practice" is not relevant to the establishing of the group relationship

the Courts have not added any requirement of "practice" as a condition to the finding of multi-union, multi-employer bargaining units. At best, history or practice will tend to establish consent or its lack of consent. And in the present instance Local 2020 has a history and practice of being part of the Southern California Conference. Indeed, its lengthy adherence to the group estops it from denying its consent to the group collective bargaining arrangement. See, for example, Lewis v. Mearns, 168 F. Supp. 134 (D.C. N.D. W.Va., 1958), aff'd 268 F.2d 427 (C.A. 4, 1959); N.L.R.B. v. Sheridan Creations, Inc., 357 F.2d 245, 247 (C.A. 2, 1966).

By introducing this new test, the Court of Appeal for the Ninth Circuit (which cites no authority for it, by the way) has created and adopted a rule which is in conflict with the decisions of Courts of Appeal in the other circuits (including its own) which do not make any such requirement. In addition to the cases cited already see N.L.R.B. v. Jeffries Banknote Company, 281 F.2d 893 (C.A. 9, 1960); N.L.R.B. v. Local 210, 330 F.2d 46, 47 (C.A. 2, 1964); Universal

Insulation Corporation v. N.L.R.B., 361 F.2d 406 (C.A. 6, 1966); N.L.R.B. v. Johnson, 368 F.2d 549 (C.A. 9, 1966).

Indeed, even the National Labor Relations Board has not in some of its more recent pronouncements adopted the Court's rule. See, for example, Local No. 42 and Delaware Contractors Association, Inc. 193 N.L.R.B. No. 73 (1971); Sacramento Automotive Association and International Association of Machinists, 193 N.L.R.B. No. 117 (1971).

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING EFFORTS TO DESTROY GROUP COLLECTIVE BARGAINING ARRANGEMENTS WHICH ARE GENERALLY SUPPORTED BY THIS COURT

By allowing in this instance the local union (2020) to withdraw from the group bargaining arrangement in both an untimely and equivocal manner (see Publishers' Association of New York City v. N.L.R.B., 364 Fed. 293, 295 (C.A. 2, 1966), cert. denied 385 U.S. 971) the decision of the Ninth Circuit creates a problem resulting from

the introduction of a new element of instability in traditional arrangements for bargaining collectively in an orderly fashion by small employers who may be scattered over a wide geographic area. In this case, the record shows the employers are small, and the geography is far-flung (it embraces 12 Southern California Counties).

The record shows also that Local 2020 was a member of the 12 Southern California Counties Mill Conference of Unions, and had been since 1965. The Conference (including Local 2020) had had contracts with SCACM since 1965. Therefore, Local 2020 was an integral part of the collective bargaining structure in the kitchen and bathroom cabinet industry, and was not just an independent union trying to negotiate agreements with independent employers. Everybody involved in these proceedings belonged to the multi-union, multi-employer bargaining structure (SCACM and the Southern California Conference).

Nowhere in the record of this matter is there a shred of evidence that Local 2020 ever withdrew from the Conference of Unions, let alone from the multi-union,

multi-employer bargaining structure. On the contrary, by its execution of the 1968-71 Master Labor Agreement (and a similar prior agreement) it consented to an arrangement whereby "all employers who are or who become members of the Southern California Association ... are parties to this agreement and are entitled to the benefits and subject to the obligations thereof. ..." (Emphasis added.)

To permit unilateral and untimely and uncommunicated withdrawal in the present instance is to permit the erosion of many group collective bargaining arrangements which may have been carefully and painfully arrived at over several years at the instance of a disgruntled union or, for that matter, of a disgruntled employer.

The fracturing of the bargaining structure which will result from the decision of the Ninth Circuit will deny smaller employers

(1) of comparatively equal bargaining strength vis-a-vis the unions,

(2) of a better informed and more intelligent way of handling labor-management relations,

(3) of the assurance that all employers in the group are being treated with some degree of equality in their labor costs so that they can compete fairly with each other, and

(4) of a less costly way of obtaining competent labor relations counsel and assistance.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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